Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC, FF

Introduction

The tenant applies to cancel an eviction notice given for cause and for an order that the landlord comply with the law and/or the tenancy agreement.

The tenant has not filed a copy of the eviction notice. She has not particularized the nature of the compliance order sought.

The landlord objects to the proceeding arguing that the tenant's application was made on October 3, 2014 yet was not mailed to her until October 26, 2014, contrary to the Process document contained in the package served on her and which states that the Hearing Package was to be served on her within 3 days of it becoming available.

Issue(s) to be Decided

Can the tenant's application proceed in these circumstances?

Background and Evidence

Neither party has filed a copy of any Notice to End Tenancy in the approved form required by s. 52(e) of the *Residential Tenancy Act* (the "*Act*"). The tenant has filed no evidentiary material. The landlord has filed no evidentiary material relating to an eviction notice.

Rule 2.5 of the Residential Tenancy Branch Rules of Procedure states, in part:

To the extent possible, at the same time as the application is submitted to the Residential Tenancy Branch, the applicant must submit to the Residential Tenancy Branch:

- A copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy.

According to the audit trail maintained by the Residential Tenancy Branch ("RTB"), the tenant was emailed her processed application and notice of hearing document on the morning of October 3, 2014 with the instruction: "Your Application for Dispute Resolution has been processed. Please read the following instructions carefully, as they contain important information."

The email instructions go on to say: "You must serve the full Notice of Hearing package to the respondent in the next 3 days either in person, or by sending the documents to each respondent by Canada Post registered mail."

And further: "If your application is based on a Notice to End Tenancy, you must ensure a copy of the Notice to End Tenancy is submitted to our office, and served on the other party."

The tenant's representative, her mother Ms. N.M., offered no explanation for the tenant's failure to file a Notice to End Tenancy and indicated that the delay in serving the landlord was caused by her educating herself about what needed to be sent to the landlord and by the fact that she and her daughter do not live near each other.

The landlord argues that since the three day rule was not complied with, the application should be considered abandoned due to late service. In the event I disagree she requests an adjournment to permit her time to prepare.

Analysis

I refer to the missing document as an "eviction notice" rather than as a Notice to End Tenancy because the latter connotes a formal Notice issued under the provisions of the *Act* and in the approved form. I have not seen the eviction notice and so cannot determine whether it is one in accordance with the form required by law or not. If it is not, if for example, it is a mere slip of paper, then it is of no effect.

The failure by the tenant to file a copy of the eviction notice is a breach of the foregoing Rule 2.5 however, such a breach does not nullify a proceeding (Rule 17.2).

The requirement to serve the Notice of Hearing package within three days after making the application is a requirement noted in the "Process" document referred to by the landlord. It was also a requirement made know to the tenant in the October 3rd email from the RTB as "important information." It is also a requirement imposed by Rule 3.1 of the Rules of Procedure.

Though the 3 day rule is noted in these three different places, the rule emanates from the statute itself. Section 59 (3) of the *Act* provides;

> (3) Except for an application referred to in subsection (6), a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it, or within a different period specified by the director.

By waiting until October 23rd to give the landlord a copy of the October 3rd application, the tenant has breached a statutory requirement. It is not simply a breach of the Rules or of an information brochure or email.

The *Act* does not say what happens when an applicant breaches s. 59 (3). It does not provide for any penalty for non-compliance. In other cases, for example a situation involving s. 38 of the *Act* (requiring a landlord to make and application within 15 days after the end of a tenancy and receipt of the tenant's forwarding address in writing), the *Act* imposes a penalty of double the amount of a security deposit or pet damage deposit. There is no such sanction with s. 59 (3).

In my view, the purpose of s. 59 (3) requiring timely service of the originating documents is to ensured that a respondent has early knowledge of the proceeding and is afforded a fair opportunity to prepare. The *Act* does not contain any other provision to ensure such timeliness at the start of a proceeding, although Rules of Procedure created under the statute impose specific time requirements for evidence to be traded before a hearing. It is likely that s. 59 (3) was drafted with the expectation that hearings would be set for only a few weeks after the application was made. That is in keeping with the broad intention of the *Act* to provide a speedy and inexpensive dispute resolution mechanism for landlords and tenants in British Columbia. In such a case, it is vital that the origination documentation reach the respondent in very short order and s. 59 (3) achieves that purpose.

In this case the applicant tenant sent the origination documents twenty three days after the application was made. The landlord received the Hearing Package by registered mail on October 29th. The present Rules of Procedure, Rule 3.15, required the respondent landlord to submit her evidence and give the tenant a copy no less than seven days before the hearing. The landlord therefore had twelve days to amass, organize, submit and serve the tenant with her evidence.

Section 59 (3) says that an applicant “must” serve the respondent with the origination documents within three days of making it. The *Interpretation Act*, RSBC 1996, c. 29; provides that in an enactment "must" is to be construed as imperative. That means “mandatory.”

Despite the apparently conclusive definition of “must” in the *Interpretation Act*, courts have held that in some circumstances the use of the “must” in an enactment is “directory” only and its effect can be avoided where no prejudice has resulted from the breach of it.

In *Hyland Homes Ltd.* v *Thomas Pickering* et al, 2000 BCSC, 524 (Downs, J.) a provision of the *Residential Tenancy Act*, RSBC 1996, c. 406 was under consideration in a dispute between the landlord of a manufactured home park and the tenants of the park. The dispute involved rent increases imposed on the tenants over a series of years. Under that earlier legislation there existed a Manufactured Home Park Dispute Resolution Committee (DRC) created by the statute and available to mediate manufactured home park disputes.

At that time subsections (3) and (4) of s.71 of the *Residential Tenancy Act* provided:

> (3) If within 30 days after the application for mediation is filed under section 69(1) the dispute resolution subcommittee is satisfied that the parties have failed to enter into a written agreement resolving the dispute, the dispute resolution subcommittee **must** promptly give the parties a written notice.
>
> (a) containing a recommendation for ending the dispute, or
>
> (b) ending the mediation without a recommendation.

(*emphasis added*)

Due to a tangled series of applications, a judicial review and a court ordered stay of proceedings, a subcommittee of the DRC failed to give the required written notice until well past the thirty day period. The landlord argued that the tenants could not therefore proceed with their challenge to the rent increases.

Madam Justice Downs reviewed the relevant law and held that despite the definition of “must” in the *Interpretation Act*, the common law allowed a less strict interpretation of the word “must” where it was related to the performance of a public duty, in that case the duty of the statutorily constituted DRC to give notice, and where serious general

inconvenience or injustice would result to persons who had no control over those entrusted with the duty.

In this case there is no “public duty” involved. The duty is one “entrusted” to a party to the proceeding; the applicant, and she had control over her own compliance with that duty. I find that I am not at liberty to interpret the word “must” otherwise that as a mandatory direction to the applicant.

Arbitrators are given a general power to extend time limits in exceptional circumstances. I find that I do not have that discretion in this case.

Section 59 (3) of the *Act*, above, provides that the applicant must serve the respondent within the three day period “or within a different period specified by the director.” In my view the word “specified” is indicative of a prospective action. That is, if a different period for service is to be allowed, it must be authorized at the time the application is being made or at least before service has been effected, and not after. Had the subsection meant to indicate that the director could extend the time for service of the origination documentation after expiry of the three day period or even after service of the originating documents, the drafters of the legislation would have used the phrase “extend a time limit,” as used elsewhere in the *Act.*

It is significant that s. 66 (1) of the *Act* permits the director to extend time limits but specifically excludes the three day time limit in s. 59 (3). Section 66 (1) provides:

> 66 (1) The director may extend a time limit established by this Act only in exceptional circumstances, **other than as provided by section 59 (3) [starting proceedings]** or 81 (4) [decision on application for review].

(emphasis added)

Even if I concluded there were exceptional circumstances in this case or that the respondent landlord would not suffer significant prejudice, I cannot specify a different period for service at this late day or extend the time for service of the originating documents.

In result I find that due to the tenant’s failure to comply with the mandatory service provision in s. 59 (3), her application to cancel the eviction notice has not been properly constituted in accordance with the requirements of the *Act* and cannot proceed.

At the hearing the landlord made a verbal request for an order of possession, as she is entitled to do under s. 55 of the *Act*. I find I cannot issue an order of possession because it has not been shown that the tenant has been served with and is applying to cancel a Notice to End Tenancy in the approved form. No such document was presented by either party.

Conclusion

The tenant's application to cancel an eviction notice is dismissed with leave to re-apply, subject to the time limits imposed by law.

The landlord's verbal request for an order of possession is denied. She is free to make a formal application for that order on production of a Notice to End Tenancy in the approved form.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: November 18, 2014

Residential Tenancy Branch